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No. 91-670

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner

v.

RENE MARTIN VERDUGO-URQUIDEZ,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Whether the transborder kidnapping from Mexico of a Mexican national by United States agents, which action violates the laws of Mexico and the existing extradition treaty with Mexico, mandates repatriation of the victim upon the repeated and unequivocal demands of Mexico.

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**BRIEF IN OPPOSITION TO PETITION
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Respondent, RENE MARTIN VERDUGO-URQUIDEZ, by and through his attorneys, Patrick Q. Hall and Charles L. Goldberg, respectfully requests that the Petition for a Writ of Certiorari, filed by the Solicitor General on behalf of the United States, be denied and that the decision of the United States Court

of Appeals for the Ninth Circuit be affirmed.

OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix ("PA") 1a-65a) is reported at 939 F.2d 1341 (9th Cir. 1991). The opinion of the District Court (PA 66a-69a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1991. The jurisdiction of this Court has been invoked by Petitioner under Title 28, United States Code section 1254(1). Respondent has consistently asserted that the District Court lacked jurisdiction to prosecute him.

TREATY INVOLVED

The Extradition Treaty between the United States and the United Mexican States, which entered into force on May 4, 1978, is located at 31 U.S.T. 5059,

T.I.A.S. No. 9656, and is reprinted in Appendix C of Petitioner's brief (PA 70a-86a).

STATEMENT OF THE CASE

Respondent VERDUGO has never had an opportunity to establish the true circumstances surrounding his kidnapping from Mexico. The true facts would show that from as early as April, 1985 through January 24, 1986, United States law enforcement officers formulated a plan to unlawfully kidnap Respondent and others from the Republic of Mexico in connection with Operation Leyende, the official investigation into the disappearance and death of DEA Special Agent Enrique Camarena-Salazar.

United States law enforcement officers and Department of Justice officials discussed among themselves their unilateral conclusion that the formal extradition of VERDUGO from the

Republic of Mexico pursuant to the long-standing Extradition Treaty entered into between the two countries would not be successful. These persons neither consulted with appropriate Mexican officials or considered a request for the provisional arrest of VERDUGO pursuant to the Treaty. Rather, United States law enforcement officers intentionally and deliberately determined that they would not make a request for the extradition of Respondent. United States law enforcement officials contacted a group of corrupt, local Mexican police officers who had previously performed kidnappings. These men did not seek to enforce any Mexican laws but rather were acting solely for their own pecuniary interests. Some of the individuals were not even police officers in Mexico. The United States agents then masterminded

the kidnapping and transportation of Respondent VERDUGO from Mexico to the United States. It is believed that $50,000 was given to these six men in advance of their actions. Additionally, promises of the payment of another $50,000 when the job was finished were made.

On January 24, 1986, while driving his vehicle on a street in San Felipe, Baja California, Mexico, Respondent VERDUGO was forced to stop his vehicle by the six plain clothes individuals. These men were driving two unmarked vehicles which pulled in front of Respondent VERDUGO.

Without identifying themselves, these individuals forcibly opened the door to Respondent VERDUGO's car and physically removed him. He was then forced into the rear seat of one of the two cars driven by the six individuals

and was forcibly handcuffed, his hands twisted behind his back. One of the six placed a blindfold on Respondent's head and forced his head down below the windows of the car. At some point, a jacket was placed over Respondent VERDUGO's head. He was held in this position the entire time. Respondent VERDUGO nearly suffocated due to the manner in which he was held captive. During the entire trip, Respondent VERDUGO was in fear for his life.

Two unidentified United States law enforcement officials were present at the scene of the stop and supervised the kidnapping. The agents followed the two vehicles as they transported Respondent VERDUGO towards Mexicali. Upon their arrival at the border, Respondent VERDUGO was pushed through a hole in the United States border fence just west of Calexico. There, he was taken into

custody by United States law enforcement officials who were awaiting his forced entrance into the United States. Shortly thereafter, his residence(s) in Mexico were searched by U.S. and Mexican law enforcement officers without a warrant. See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

After the circumstances of Respondent's abduction were investigated, a Mexican prosecutor issued arrest warrants in the Republic of Mexico for five of the six individuals specified above. The five men are wanted to stand trial on charges of kidnapping and false imprisonment of VERDUGO. These individuals have been admitted into the United States Witness Protection Program, where they apparently remain today.

The Republic of Mexico, in its first diplomatic note dated April 23, 1986,

(App. A, infra, at pp. 2a), noted that the reports of VERDUGO's abduction by former Mexican police personnel hired by United States authorities, if true, "occurred without the knowledge of the Mexican Federal authorities and are violations of Mexican law and international law." In its response dated March 16, 1987, (Respondent's Supplemental Excerpt of Record on Appeal at pages 48-49), the Department of State indicated that Mr. VERDUGO's apprehension was carried out by the "cooperative efforts of the state police of Baja, California, the Republic of Mexico, pursuant to a long-standing policy of cooperation between law enforcement agencies of our two nations," and as such it believed that the joint actions were proper.

On August 26, 1987, the Republic of Mexico responded that "it cannot

recognize as valid a judicial practice that disregards the procedures established by the extradition treaty currently in force between Mexico and the United States. The reason for this being that such practice constitutes an infringement of the constitutional guarantee of due process of law that in cases of deprivation of liberty like this one is recognized by the Political Constitutions of both Mexico and the United States of America." The note further requested the "kind mediation of the Department of State" in informing the corresponding United States judicial authorities of the position of the Mexican government, so that this case will be properly clarified. (App. B, infra, pp. 4a-7a).

The Court of Appeals found that these notes constituted a formal protest by the Republic of Mexico into the

manner in which the United States acquired personal jurisdiction over Respondent. (PA at pages 47a-48a; 939 F.2d at page 1343).

At a hearing held on June 20, 1988, the District Court denied Respondent's motion to dismiss the third superseding indictment, which charged five counts of kidnapping, murder, conspiracy, and violent crimes in aid of racketeering (See Petitioner's Brief in Support of Petition for Writ of Certiorari at page 5, footnote 3) due to the manner of his apprehension. The Court declined to hold an evidentiary hearing for the purposes of establishing the extent of official United States involvement in the kidnapping.

After a two month jury trial, Respondent, an innocent man, was convicted on all counts and sentenced to serve four consecutive 40 year terms in

addition to a life sentence in the custody of the Attorney General.

Although Respondent raised 21 issues on appeal asserting that he was deprived of a fundamentally fair trial, the Ninth Circuit ruled only that, if Respondent could show at an evidentiary hearing that the United States Government was involved in his kidnapping by way of participation or sponsorship, Mexico's protest gave him standing to object to a violation of the Extradition Treaty. Given the violation of the Extradition Treaty which it held had occurred, the proper remedy was to repatriate Respondent to Mexico. (PA 48a, 939 F.2d at page 1362). The Court of Appeals expressly held that the issue was properly preserved for appeal (PA at page 6a, footnote 2, 939 F.2d at page 1344, footnote 2).

The Court of Appeals gave weight to the Executive Branch's view that the treaty contained, by implication, a proscription against "the abduction of an individual from a foreign country without that State's consent." The Government of Mexico, the state whose sovereignty was violated in this case, had submitted a letter to the Court of Appeals in connection with the Government's (then) pending appeal in United States v. Alvarez-Machain, __ F.2d __ (9th Cir. 1991) (Petition for Certiorari filed, October 28, 1991, No. 91-712). In that letter, in unambiguous terms, Mexico took the position that Dr. Alvarez-Machain should be returned to the Mexico for the reasons ultimately stated by the Court of Appeals.

On November 6, 1991, Mexico sent a third diplomatic note to the Department of State. This note characterized the

August 31, 1987 note which "explicitly remarked on the illegality of the kidnapping of Mr. VERDUGO-URQUIDEZ from Mexican territory, and denounced the violation of the Extradition Treaty in force between Mexico and the United States." (App. D infra. pp. 24a). This note further stated, "The Mexican agents that detained Mr. VERDUGO-URQUIDEZ overstepped their authority, and consequently violated the rights stated in Articles 14 and 16 of the Constitution of the United Mexican States that establish principles of due process of law and the equal protection under the law; consequently those Mexican agents violated Mexican, U.S. and international laws, since the Extradition Treaty forms part of the legislation of both countries." (App. D infra, pp. 25a). Finally, the note

expressly requested the repatriation of Mr. VERDUGO-URQUIDEZ.

REASONS FOR DENYING THE PETITION

I.

THE LOWER COURT CORRECTLY FOUND THAT THE VIOLATION OF THE EXTRADITION TREATY MANDATES REPATRIATION OF RESPONDENT VERDUGO PURSUANT TO THE DEMAND OF MEXICO.

Restrictions on American seizures which occur incident to American action abroad may be imposed by the political branches through diplomatic understanding, treaty or legislation, even though the Constitution itself may not impose similar restrictions. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).

Accordingly, an extradition treaty may properly limit the circumstances by which the United States may obtain jurisdiction over an individual. The decision below merely affirms this

proposition and does not create a conflict with existing Supreme Court decisions. Petitioner's interpretation of existing authority is completely misplaced.

In Ker v. Illinois, 119 U.S. 436 (1886), a United States citizen was forcibly returned to the United States by private Pinkerton security guards. Ker had fled to Peru after his indictment in Illinois on fraud and embezzlement charges. At the time of Ker's abduction, Peru was in fact occupied by the Chilean Army. The private security guard carried an official request for extradition within the framework of the 1870 extradition treaty between the United States and Peru, but the seizure was made outside of formal extradition proceedings. This Court explicitly rejected Ker's claimed "right of asylum" under the treaty,

which presupposed that a criminal defendant has the right to insist that procedures under an existing extradition treaty be followed. This Court reasoned that since Peru had the sovereign right to deport Ker if it chose, it similarly had the right to consent explicitly or tacitly to his "informal rendition."

Ker did comment that the treaty did "regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom." Id. at 442.

Ker did not address the present situation in which a signatory to a treaty with the United States formally objected to the forcible abduction of one of its nationals from within its borders. Rather, Peru did not object at all.

Petitioner also relies upon Frisbie v. Collins, 342 U.S. 519 (1952). Frisbie involved the forcible kidnapping by Michigan police of a murder suspect living in Illinois. This Court rejected a due process claim based on this forcible abduction and also a claim based on the Federal Kidnapping Act. Frisbie did not deal with claimed treaty violations and thus does not support Petitioner's arguments in any way.

All of the cases cited by Petitioner which rely upon Ker and its progeny (including Frisbie v. Collins, 342 U.S. 519 (1952), are factually distinguishable from the instant case by the presence of one or more of the following factors: 1) The absence of an official protest by the government of the country from whom the suspect was abducted, 2) direct involvement or

consent of the foreign government in the rendition of the suspect to the United States; or 3) the absence of direct involvement of the United States in the abduction.

See United States v. Lira, 515 F.2d 68 (2d Cir. 1975), (Chilean Government voluntarily honored a DEA request); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981), (Panama and Venezuela voluntarily deported suspects); United States v. Valot, 625 F.2d 308 (9th Cir. 1980), (Thailand voluntarily deported the suspect); United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975), (defendant was expelled by Mexican officials); United States v. Cotten, 471 F.2d 744 (9th Cir. 1973), (United States citizens voluntarily deported from Vietnam); United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972), (United States citizen

voluntarily delivered); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), (defendant voluntarily deported by Peruvian authorities); United States v. Toro, 840 F.2d 1221 (5th Cir. 1988), (Panamanian authorities voluntarily turned the defendant over to DEA agents); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986), (defendant turned over pursuant to a Colombian expulsion order); United States v. Marzano, 537 F.2d 257 (7th Cir. 1976), (defendant turned over by Grand Cayman authorities); Wentz v. United States, 244 F.2d 172, 176 (9th Cir. 1957), (no United States involvement in defendant's voluntary rendition to United States by Mexican officials); Stevenson v. United States, 381 F.2d 142 (9th Cir. 1967), (no United States involvement in Mexican decision to deport United States

citizen); United States v. ex rel. Lujan V. Gengler, 510 F.2d 62 (2d Cir. 1975), (absence of an official protest); Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), ("Without an official protest, we cannot conclude that Honduras has objected to Matta's arrest); United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988), (no evidence that the Mexican Government objected to trial); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (Neither Guatamala nor Belize protested Respondent's detention); United States v. Evans, 667 F.Supp. 974, 979 (S.D.N.Y. 1987),(Absent a protest by Bermuda as to the violations of international law, the defendants had no standing); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985), (given the absence of any protest from either Switzerland or the United States as to a

mutual assistance treaty, the defendant had no standing to move to exclude or suppress Swiss bank records on the basis of a purported violation of the treaty.)

The Frisbie line of cases deals only with abductions of suspects from one state to another. There were no international treaty obligations at issue under Frisbie. See e.g. Mahon v. Justice, 127 U.S. 700 (1888) (states of the Union have only limited sovereignty and therefore do not have the same sovereign rights to protest the invasion of their territory).

Contrary to the suggestion of Petitioner, the decision of the lower court is completely consistent with prior Supreme Court decisions.

For example, in Ford v. United States, 273 U.S. 593 (1927), this Court explicitly recognized that persons seized on the high seas in violation of

a treaty between Great Britain and the United States may raise the violation of the treaty as a defense. There, the defendants did not enter a plea to the jurisdiction (subsequently abolished by the Federal Rules of Criminal Procedure) and therefore could not raise it for the first time on appeal. The Court highlighted the critical turning point distinguishing that case and the instant case from Ker , namely, Ker was not decided upon treaty grounds. The Court specifically stated that Ker did not call upon the Court to determine whether the seizure violated the treaty and if so, whether "the power of the Court to hold the defendant for trial" was implicated. Id. at page 606.

In Cook v. United States, 288 U.S. 102 (1933), this Court interpreted this same treaty involved in Ford as imposing a limitation upon United States

seizures of British vessels on the high seas. Cook was the master of the vessel who contested forfeiture proceedings of the cargo and ship. This Court considered the language of the treaty and its history in concluding that Cook had standing to raise violations of the treaty. Although the record does not reflect an official protest by Great Britain, it is evident that prior protests of seizures had occurred and that the treaty was designed to avoid further difficulties. The Government argued that the illegality of the seizure was immaterial, that the Federal court had jurisdiction and that the claimant by answering, waived any rights to object. This Court explicitly rejected these arguments, stating that, "To hold that adjudication may follow a wrongful seizure would go far to nullify

the purpose and effect of the Treaty." Id. at pages 121-122.

This application of Cook and Ford has been consistently applied by the lower courts, thereby creating no conflict of rulings among the circuits. United States v. Schouweiler, 19 F.2d 387 (S.D. Cal. 1927); United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927) (sustaining pleas to the jurisdiction of the court); and United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979) ("We read Cook and Ford to stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction."); Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931) ("An unlawful arrest is not merely an offense against the peace

and dignity of the State; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former."); Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (the Court of Appeals acknowledged that removal of a foreign national from a country which is a party to an extradition treaty with the United States accomplished by United States agents would constitute a violation of the treaty.)

The rationale of the lower court in its correct application of Ford and Cook is also supported by prior Supreme Court decisions. In United States v. Rauscher, 119 U.S. 407 (1886), this Court rejected the same arguments presently advanced by the Government, where it held that a person extradited pursuant to the Great

Britain/United States extradition treaty had standing to object to his prosecution on different charges. Notwithstanding the absence of a provision in the treaty adopting the Rule of Specialty, the court held that the defendant could properly object to his prosecution as a violation of the treaty.

Accordingly, this Court has previously ruled that violations of self-executing treaties can deprive the Court of jurisdiction and therefore a new and important question of law is not presented by Petitioner.

II.

THE LOWER COURT CORRECTLY INTERPRETED THE TREATY ACCORDING TO THE STANDARDS ESTABLISHED BY SUPREME COURT PRECEDENT.

The rules of construction of treaties are the same as those relating

to simple contracts. United States v. Choctaw Nation, 179 U.S. 494 (1900).

The clear import of treaty language controls unless application of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories. Sumitomo Shoji American Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Maximov v. United States, 373 U.S. 49, 54 (1963); See also The Amiable Isabella, 6 Wheat 1, 72 (1921).

In Factor v. Laubenheimer, 290 U.S. 276 (1933), this Court stated:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restrictive construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that

> reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. (Citations).
>
> Factor v. Laubenheimer, supra, at pages 293-294.

The Factor Court also held that other considerations such as the history of negotiations, construction of the treaty by a political department of the Government, and diplomatic correspondence may be of significance in interpreting the terms of a treaty. In construing a treaty, a Court has the further "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 399 (1985).

Application of these principles of treaty interpretation leads to the inevitable conclusion that the United

States breached the terms of the Extradition Treaty by conceiving, initiating and participating in the forcible abduction of a foreign national from Mexican territory.

The 1980 Treaty was designed to protect the sovereignty and territorial integrity of both the United States and Mexico. Treaty Article 5(1) delineates the territorial jurisdiction of the signatories. The treaty is contained in its entirety at Petitioner's Appendix C (pp. 70a-86a). Additionally, the Treaty provides that access to each country's national territory may only be gained pursuant to the treaty. Article 20(1).

Article 1 of the Extradition Treaty references the obligations of the signatories as "Contracting Parties." The United States and Mexico obviously believed that they were entering a valid and binding contract. Such an

interpretation is entirely consistent with Article 23(4), setting forth the procedure whereby either Contracting Party may terminate the treaty by simply giving notice to the other Party.

The Treaty explicitly establishes the conditions under which either party may request the surrender of a citizen of a Party from its domestic territory. However, these conditions are limited by Article 1 in the following regards: First, Article 1 compels that all the provisions of the treaty apply to extraditions. Second, Article 1 restricts the obligation of the requested party to extradite by limiting extradition to offenses committed outside the territory of the requesting party.

Article 2 of the treaty further delineates the type of offenses for which extradition may be sought. The

treaty specifically uses language which creates an affirmative obligation as opposed to a discretionary obligation. Specifically, Articles 2, 3 and the other Articles to the extradition treaty repeatedly refer to the obligation as "extradition shall take place" as opposed to other less commanding terms.

Articles 5, 6 and 7 specifically set forth circumstances under which extradition shall not be granted. These provision must be contrasted to the provisions of Articles 8 and 9 of the treaty which confer discretion upon the requested party to decline extradition. According to Article 8, when the offense for which extradition is requested is punishable by death under the laws of the requesting party, extradition then "may be refused."

Similarly, Article 9 contains discretionary provisions relating to

each party's obligations to deliver its own citizens and its obligation to prosecute its citizens if a request for extradition is denied.

Article 11 even sets forth a procedure in the case of urgency for the provisional arrest of an accused or convicted person.

Finally, Article 14 provides that the decision of the territorial sovereign whether to extradite its national is final and that the surrender of the person sought is controlled by the laws of the territorial sovereign.

The detailed nature of the procedures set forth in the Treaty, the existence of discretion to decline to surrender nationals for extradition, the provision for finality of decisions, the creation of procedures for communicating the refusal to extradite, and the clear import of the language of the treaty is

that the specified procedures limit the circumstances under which a foreign national shall be brought from the territory of one contracting party into the jurisdiction of the other. The lower court correctly concluded that this comprehensive framework was intended by the parties to delineate the exclusive circumstances under which the surrender of suspects could occur.

A contrary interpretation would render certain provisions of the treaty completely meaningless. For example, to the extent that Article 9 confers discretion to a requested Party to refuse extradition of its nationals, this discretion would be meaningless if the United States could merely kidnap a foreign national at its whim. The United States could override the decision explicitly committed to the discretion of the requested party by

simply violating its sovereign territory and kidnapping the national. The decision of the foreign country would not be final as set forth in Article 14. Moreover, the procedures set forth throughout the treaty would be completely gutted.

The only interpretation of the facts of this case which is completely consistent with the entire framework of the treaty is that forcible abductions violate the terms of the treaty.

This construction of the treaty is entirely consistent with the history of extradition treaties in effect since the 1800's. Apparently as early as 1881, it was contemplated that the extradition treaty between the United States and Mexico was intended to prevent the unconsented abduction of nationals from a foreign country. Letter of Secretary of State James Blaine to O.R. Roberts,

Governor of Texas (May 3, 1881), in Domestic Letters of the Department of State, 1784-1906 (National Archives Microfilm Publication M40, Rule 93).

In 1985, the legal advisor to the State Department further commented:

> ... Such acts (referring to foreign abductions by U.S. officials) might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations.
>
> Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986).

Based upon these factors as well as the diplomatic notes exchanged between the Republic of Mexico and the Department of State relating to the kidnapping of Humberto Alvarez-Machain, it is clear that Mexico believes that the forcible abduction of its nationals from within its borders constitutes a violation of the provisions of the

extradition treaty. This is also consistent with the exchange of diplomatic notes between the United States and Canada wherein Secretary of State George P. Schultz agreed to act to deter "transborder abductions". (App. E infra, pp. 27a-31a). .

This Court has noted that statutes, wherever possible, must be interpreted consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982). Quoting Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804).

Interpretation of the instant provisions of the extradition treaty in accordance with customary international law mandates the conclusion that forcible abductions violating the sovereign territory of Mexico violated the provisions of the treaty and customary international law. See Rodriquez-Fernandez v. Wilkinson, 654

F.2d 1382 (10th Cir. 1981), (applying customary international law relating to the Universal Declaration of Human Rights and the American Convention of Human Rights to the due process clause to the United States Constitution). There is nothing new in this proposition.

According to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 T.I.A.S. No. 993, Article 2(4), kidnapping a foreign national was one of the focuses of modern extradition treaties. See also Charter of Organization of American States, April 30, 1948, 2 U.S.T. 2394, 2429, T.I.A.S. No. 2361, as amended, Protocol of Buenes Aires, February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, Article 20.

The Government's contentions that the legality of Respondent's abduction is a nonjudiciable political question is

without merit. As this Court itself noted in Baker v. Carr, 369 U.S. 186 (1962), "It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id. at page 211. This Court itself in Verdugo I held that the Government may be limited by its treaty obligations in the conduct of its foreign relations.

The treaty itself and in its implementing statutes expressly create a zone of executive branch decision making which would not be subject to judicial review. Specifically, Article 9 of the treaty reserves each executive the right to refuse to surrender a fugitive to the other country when the fugitive in a citizen of the requested country. Title 18 U.S.C. section 3186 provides that the Secretary of State may order a person committed by a court to be surrendered

to the requesting country. These provisions expressly accommodate the political realties which may underlie a request for extradition.

"For better or worse, we live in a world of nation-states," in which our Government must honor the letter and spirit of its freely negotiated international compacts and obligations. United States v. Verdugo-Urquidez, 494 U.S. at page 275. Because the Ninth Circuit's ruling properly upheld this principle on the basis of existing precedent, the Petition for a Writ of Certiorari should be denied.

III.

THE RULING OF THE LOWER COURT ONLY AFFECTS TWO INDIVIDUALS IN UNIQUE CIRCUMSTANCES.

Notwithstanding assertions by Petitioner that the government's law enforcement options will be restricted

in a particularly critical context, the reality of the lower court's holding is that only two individuals in modern history will be affected. The uniqueness of the lower court's ruling is that only upon a formal protest by a foreign sovereign which has entered into a treaty with the United States regarding extradition, which treaty is circumvented and violated by the forcible abduction of a foreign national, is the jurisdiction of a court affected.

In the past fifty years, there have apparently been only three formal protests filed by foreign sovereigns regarding the circumstances in which an individual has been abducted, in the instant case, the related case of United States v. Alvarez-Machain, __ F.2d __ (9th Cir. 1991), petition for certiorari filed, October 28, 1991, No.

91-712, and Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (protest by Canada, but no U.S. involvement in abduction). Thus, of the thousands of criminal prosecutions which have occurred in this country, only two individuals are actually affected. Such limited and episodic problems do not constitute "special and important" reasons within the meaning of Rule 10 of the Supreme Court Rules. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955); Fay v. Noia, 372 U.S. 391 (1963) and therefore certiorari should be denied.

IV.

THE LOWER COURT NEVER MADE FACTUAL DETERMINATIONS OF UNITED STATES' INVOLVEMENT IN THE KIDNAPPING OF RESPONDENT VERDUGO.

In the lower court, Respondent was denied an evidentiary hearing

regarding the circumstances of his arrest. Petitioner's statement of facts is based primarily upon conjecture and surmise. The Ninth Circuit remanded the case to the District Court for the express purpose of conducting evidentiary hearings to determine whether the United States was involved in the kidnapping of Respondent. Accordingly, the writ should be denied because the case is not yet ripe for review. Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974), Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

V.

CONCLUSION

Respondent VERDUGO respectfully requests that the Petition for a Writ of Certiorari be denied and that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

GOLDBERG, FRANT & HALL

PATRICK Q. HALL
November 22, 1991

CHARLES L. GOLDBERG
November 22, 1991

APPENDIX A

Mexican Diplomatic Note,

April 23, 1986

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and wishes to refer to the case of Mr. Rene Martin Verdugo Urquidez.

As the Department is well aware various newspapers, both Mexican and North American, have stated that on January 24th of this year, Mr. Rene Martin Verdugo was kidnapped on Mexican territory and taken to the city of Calexico, California, where he was held for alleged drug trafficking charges. According to such press information, the kidnapping of the above mentioned individual was carried out by former

Mexican policemen, who in turn were hired by United States authorities, who later allowed them to enter together with their families and reside in United States territory under the protection of the "U.S. Marshal Service".

Apparently, Mr. Verdugo is being held at the "Metropolitan Correctional Center" of San Diego and the Media has indicated that he has recently been taken to testify before the United States Congress.

The Mexican Embassy, following instructions of its Government, would like to point out that those facts, if true, occurred with complete unawareness of Mexican Federal authorities and they consititute violations of Mexican as well as international law.

In this regard, the Embassy requests of the Department of State all the information available from corresponding

U.S. authorities in order to determine the veracity of the above stated.

The Embassy of Mexico avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
April 23, 1986

To the Department of State
Washington, D.C.

APPENDIX B

Mexican Diplomatic Note,

August 31, 1987

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and wishes to refer to the Department's note of March 16, 1987, regarding the kidnapping in Mexican territory of the Mexican citizen Rene Martin Verdugo, on January 26, 1986.

In this regard, and upon instructions from its Government, the Embassy wishes to clarify to the Department that it cannot recognize as valid and legal a practice that disregards the procedures established by the Extradititon Treaty currently in force between Mexico and the United

States. The reason for this being that such practice constitutes an infringement of the constitutional rights of due process of law and equal protection of law that in cases of deprivation of liberty, like this one, is recognized by the Political Constitutions of both Mexico, and the United States of America.

With reference to the case in question, the Embassy wishes to provide the Department with the attached copy of the ruling issued by the Southern California District Court on April 11, 1986. This document explicitly states at page six, lines 4 through 8, the U.S. authorities and officials from the U.S. Drug Enforcement Agency (DEA) surreptitiously hired Mexican police officers, with a payment of US$32,000.00, on January 28, 1986, to kidnap Mr. Rene Martin Verdugo and bring

him to the United States illegally, as is also stated on lines 15 through 24 of the same page of the document.

Furthermore, at page 14, lines 9 through 21, of the document, the District Court states that previous rulings by U.S. courts have recognized that abductions from another country violate international law when the offended state objects to the conduct. The Department is well aware that the Mexican Government made a formal complaint regarding the kidnapping of Mr. Rene Martin Verdugo, by way of this Embassy's diplomatic note number 298, dated April 23, 1986.

Consequently, the Embassy requests the kind mediation of the Department of State in informing the corresponding U.S. judicial authorities of the position of the Mexican Government, so

that this case will be properly clarified.

The Embassy of Mexico avails itself of this opportunity to renew to the Department of State the assurances of its highest and distinguished consideration.

Washington, D.C.

August 26, 1987

APPENDIX C

MEXICAN DIPLOMATIC NOTE,

OCTOBER 23, 1991

UNOFFICIAL TRANSLATION

Washington, D.C. October 23, 1991

Excellency:

On behalf of my Government, I have the honor of referring to the Extradition Treaty signed between the United Mexican States and the United States of America, in order to request from Your Excellency's Government the provisional detention for extradition purposes of Rene Verdugo Urquidez, on the basis of articles 1, 2, and

particularly article 11 of the aforementioned Treaty. This person is wanted by Mexican authorities who consider him probably guilty of drug related crimes, namely marihuana and cocaine possession, transportation and trafficking, and supplying cocaine; as a result, a warrant for his arrest was issued in criminal proceeding 44/86 by the 1st District Judge in the State of Baja California.

This petition is made upon instructions from the Mexican Secretariat of Foreign Relations in written communciation 7169, the pertinent sections of which are transcribed below by the undersigned, the Ambassador of Mexico to the United States of America, as if they were his own text, and for all purposes:

"Upon instructions from senior Mexican Authorities, I am hereby

informing you that the Office of the Attorney General of the Mexican Republic, in its note CGJ/UAII/990/91, of October 18, 1991, has requested this Secretariat of Foreign Relations to submit to the competent U.S. authorities the petition for the provisional detention for extradition purposes of RENE VERDUGO URQUIDEZ. On March 17, 1986, a warrant of arrest was issued against this person by the 1st District Judge in the State of Baja California, as part of criminal proceeding 44/86, for considering him probably guilty of drug related crimes, in the form of drug possession, transportation, and trafficking, taking marihuana and cocaine out of the country and supplying cocaine. These crimes are covered and punishable by articles 193, part I, and 197, parts I and II of the Penal Code for the Federal District concerning

state law matters, and for the Republic as a whole concerning federal law.

In view of the above, on the basis of articles 102 and 119 of the Political Constitution of the United Mexican States, article 11 of the Extradition Treaty between the United Mexican States and the United States of America, article 3 of the International Extradition Law, article 2, part VII, and article 9, part II of the Bylaws of the Office of the Attorney General, as well as article 15, part IV, and article 36 of the Bylaws of this Secretariat of Foreign relations, I kindly request that you submit, through the appropriate diplomatic channels, to the competent authorities of the United States of America the formal petition for the provisional detention of RENE VERDUGO URQUIDEZ, against whom the

aforementioned warrant of arrest has been issued.

To this end, enclosed you will find a copy of note 990/91 from the Office of the Attorney General, which contains a description of the actions of which RENE VERDUGO URQUIDEZ is accused, as well as his personal data. With regard to this person's whereabouts, it is known that he is being held in custody at a U.S. penitentiary center; his PROVISIONAL DETENTION FOR EXTRADITION PURPOSES is requested in view of the fact that there is a possibility he may be freed, since the Ninth Circuit Court of Appeals of Pasadena, California, revoked the sentence issued against him.

In this regard, I am transcribing below for all legal purposes the text of note CGJ/UAII/990/91, dated October 18, 1991, from the Attorney General of the

Republic of the United Mexican States, which reads as follows:

TO THE H. FERNANDO SOLANA MORALES
SECRETARY OF FOREIGN RELATIONS

I, IGNACIO MORALES LECHUGA, Attorney General for the Republic, before you with due respect, I appear and state:

That the Judge of the First District Court in the State of Baja California, on March sixteenth, nineteen hundred and eight six, issued a warrant of arrest against RENE VERDUGO URQUIDEZ among others, in the criminal case number 44/86, for his presumptive guilt in the commission of the crime against health in the modalities of Possession, Transportation, Trafficking and Taking out of the country marijuana and cocaine, and supplying cocaine, foreseen and sanctioned under Articles 193

section I and 197 sections I and II, of the Criminal Procedures Code for the Federal District in non Federal Matters and for all the Republic in Federal Matters.

By the above, and based on the provisions of Articles 102 and 119 of the Political Constitution of the United States of Mexico, 11 of the Treaty of Extradition between the United States of Mexico and the United States of America, 3 of the International Extradition Law, 2 section VII and 9 section II of the Organic By-Laws of the Attorney General's Office for the Republic, I request that through the proper channels, the Government of the United States of America be requested THE PROVISIONAL ARREST FOR EXTRADITION PURPOSES of RENE VERDUGO URQUIDEZ, against whom said warrant of arrest was issued.

The crime for which is requested the PROVISIONAL ARREST FOR EXTRADITION PURPOSES of Mr. VERDUGO URQUIDEZ, is included in the Appendix of said Treaty under number 14. Besides being punishable in the legislation of both countries by prison whose maximum terms is not less than one year.

The illicit conduct that the requested person is accused of, consists of the complicity with other two individuals by the name of SERGIO SANCHEZ MUÑOZ and MICHAEL COOPER, they were involved in narcotraffic in the State of Baja California until the early part of 1986 carrying out the following acts.

Mr. RENE VERDUGO URQUIDEZ and SERGIO SANCHEZ MUÑOZ transported by sea, marijuana from Puerto Vallarta, Jalisco to San Felipe, Baja California, where on board of land vehicles, moved the drug

to the house of MICHAEL COOPER in the Centro Turisto Mosqueda (Mosqueda Turist Center), located at 60 kilometers on the road Mexico-San Felipe. Later on, from that place they would transfer it by air on an aircraft owned by VERDUGO URQUIDEZ, to the nearby north american cities which were Calexico, California, Yuma, Arizona, and San Diego.

On other ocassions, VERDUGO URQUIDEZ, took in suitcases different amounts of cocaine to the house of MICHAEL COOPER which later on, on board of the aircraft was delivered to the above mentioned cities of the United States of America.

Finally, it is worth mentioning, that on other ocassions, the now requested one and his narcotraffic partners, organized parties or small gatherings and furnished their employees

small amounts of drug for personal consumption.

The described facts and the elements of proof filed during the investigation of illicit behavior attributed to the accused and his accomplices, motivated the H. Judge of the First District Court in Baja California to issue the warrant of arrest against him, for his presumptive guilt in the commission for crimes against health in the mode of Possession, Transportation, Trafficking, and taking marijuana and cocaine out of the country and supplying cocaine, foreseen and sanctioned by Article 193 section I and Article 197 sections I and II of the Criminal Code for the Federal District in non Federal Matters, and for all the Republic in Federal Matters.

In compliance with Article II of the Extradition Treaty executed between the United States of Mexico and the United

States of America, the description of the accused according to the records as of 1986 is given as follows:

NAME:	RENE VERDUGO URQUIDEZ
SEX:	MASCULINE
AGE:	38 YEARS OLD
EYES:	BLUE
HEIGHT:	1.78 m APPROXIMATELY
COMPLEXION:	FAIR
PARTICULAR MARKS:	HE HAS A TATOO ON ONE SHOULDER IN A SHAPE OF A FLOWER WITH DIFFERENT COLORS.

Regarding his whereabouts, we know, and it is also of public knowledge, that the accused is detained in a Penitentiary Center in the United States of America, and due to the possibility that he obtains his freedom since the Court of Ninth Circuit of Appeals, reversed the sentence pronounced against

him, we request his PROVISIONAL DETENTION FOR EXTRADITION PURPOSES.

On terms of the stipulations in the Extradition Treaty that our country celebrated with the United States of America, the promise of formalized the extradition request within a 60 day term counting from the date the PROVISIONAL ARREST FOR EXTRADITION PURPOSES of Mr. RENE VERDUGO URQUIDEZ is issued, is granted.

Because of the above, I request respectfully from you, H. Secretary of Foreign Relations to issue your instructions so that through that H. Secretariat, THE REQUEST OF PROVISIONAL ARREST WITH EXTRADITION PURPOSES of RENE VERDUGO URQUIDEZ be presented to the Government of the United States of America. I would appreciate any information that you would provide on this matter to the undersigned as well

as to the General Juridical Coordinator of this Institution about the steps that will be carried out.

HAVING NOTHING ELSE TO ADD; I take advantage of the occasion to greet you. Mexico, Federal District, August twenty eight, nineteen ninety one.

THE ATTORNEY GENERAL OF THE REPUBLIC

IGNACIO MORALES LECHUGA

As a result, and since the above note contains the events and facts concerning the charges, a description of RENE VERDUGO URQUIDEZ, and the promise to formalize the extradition request as well as notification of the existence of a warrant of arrest issued by the competent authority against this person, I submit the above to Your Excellency as the true information it is.

In this regard, I assure Your Excellency that I consider my own the promise to formalize the petiton for extradition; and the I will submit said formal petition to Your Excellency within sixty days following confirmation of the provisional detention for extradition purposes of the accused. As a result, I would very much appreciate being informed, as soon as possible, of the exact date on which the sixty day period--mentioned in the Extradition Treaty--starts running.

In view of the above, Mr. Secretary, and since this petition satisfies the conditions described in the Extradition Treaty currently in force between our two countries, and, to the best of my knowledge, also satisfies the internal procedures of the Mexican State and the procedure established by the Treaty concerning PROVISIONAL DETENTIONS, I ask

Your Excellency's kind mediation so as to obtain from the competent U.S. authorities, even the judicial authorities, the extradition of RENE VERDUGO URQUIDEZ from the United States of America to Mexico.

With thanks in advance for Your Excellency's valuable assistance concerning this matter, I avail myself of this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

Gustavo Petricioli
Ambassador

His Excellency
James A. Baker, III
Secretary of State
Washington, D.C.

APPENDIX D

MEXICAN DIPLOMATIC NOTE, NOVEMBER 6, 1991

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the Department of State and wishes to refer to the case of Mr. Rene Martin Verdugo Urquidez.

In this regard, and taking into account the state of the judical proceedings against this person, the Government of Mexico reiterates the content of its diplomatic notes of April 23, 1986, and August 31, 1987, to the Government of the United States. It should be indicated that the note dated April 23 was only a request for information on the events surrounding this case, and that there was no

notification of Mr. Verdugo Urquidez's detention. However, the note indicated that if the news published by the press regarding the kidnapping of Mr. Verdugo Urquidez were true, such an action would constitute a violation of Mexican, U.S. and international laws.

The second note by the Government of Mexico explicitly remarked on the illegality of the kidnapping of Mr. Verdugo Urquidez from Mexican territory and denounced the violation of the Extradition Treaty in force between Mexico and the United States. The note mentioned the District Court findings that U.S. agents paid for the kidnapping.

It is on the basis of the above statement by the District Court that the Government of Mexico wishes to emphasize the need to determine the responsibility for the kidnapping of the persons involved. The Mexican agents that

detained Mr. Verdugo Urquidez overstepped their authority, and consequently violated the rights stated in Articles 14 and 16 of the Constitution of the United Mexican States -- that establish principles of due process of law and the equal protection under the law; consequently, said Mexican agents violated Mexican, U.S. and international laws, since the Extradition Treaty forms part of the leglislation of both countries.

As a result, the Government of Mexico requests that the harm done be corrected through the repatriation of Mr. Verdugo Urquidez. Once the repatriation takes place, the Government of Mexico will prosecute Mr. Verdugo Urquidez for his probable responsibility for the drug related crimes of possessing, transporting, taking out of the country and trafficking in marihuana

and cocaine, as well as supplying cocaine, Confirmation of this fact was given by way of the Embassy's diplomatic note 1002, of October 23, 1991, requesting the provisional detention for extradition purposes of Mr. Verdugo Urquidez.

The Embassy of Mexico avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
November 6, 1991

To the Department of State
Washington, D.C.

APPENDIX E

EXCHANGE OF LETTERS
CONSTITUTING AN UNDERSTANDING
BETWEEN THE GOVERNMENT OF
CANADA AND THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
CONCERNING THE PROTOCOL
AMENDING THE TREATY ON
EXTRADITION SIGNED AT OTTAWA ON
JANUARY 11, 1988

THE SECRETARY OF STATE
WASHINGTON

January 11, 1988

Dear Mr. Minister:

I refer to the Protocol Amending the Treaty on Extradition between the United States and Canada we signed today and

have the honor to address to you the following.

The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters" is an extraditable offense under the United States - Canada Extradition Treaty.

Where a person has been charged with or convicted of such an offense in Canada and is found within the jurisdiction of the United States, the United States agrees, upon request, to commence extradition proceedings against such a person pursuant to the Treaty in order that the person may be returned to Canada.

The United States will use its best efforts to honor Canadian requests for

testimony, information, or other assistance pertaining to such abductions.

Canada and the United States agree to cooperate to deter such transborder abductions. To assist in achieving that purpose, the United States will continue to exert its best efforts to inform those engaged in business as bail bondsmen or bounty hunters and other interested parties of the positions set forth in this exchange of letters.

The Right Honorable
Joe Clark, P.C., M.P.,
Secretary of State
For External Affairs of Canada,
Ottawa.

Canada and the United States agree to consult promptly concerning any case of transborder abduction involving bounty hunters which might arise in the

future. The purpose of such consultations shall be to address matters relating to any such case, including any request by the Government of Canada for the return of the person so abducted. In the event of return, the Governments agree to cooperate to have the abducted person escorted to Canada and taken into custody at the border, pursuant to a request for provisional arrest, pending the outcome of extradition proceedings. For the purpose of these consultations, the principal law enforcement contact for the United States will be the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

I have the honor to propose that this letter and your reply constitute an understanding between our two Governments which is not intended to

create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Sincerely,

s/

George P. Shultz